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No. 89-1396

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

v.

WILLIAM DAVID EVANS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA SECOND APPELLATE DISTRICT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does the Railway Labor Act, 45 U.S.C. §151, et seq., preempt a railroad employee's statutory cause of action for employment discrimination in violation of the California Fair Employment and Housing Act, Government Code § 12940 et seq.?

2. Is a statutory cause of action for employment discrimination in violation of the California Fair Employment and Housing Act, Government Code § 12940 et seq., which exists independent of and does not require an interpretation or application of a collective bargaining agreement, preempted by the Railway Labor Act, 45 U.S.C. §151, et seq.?

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA SECOND APPELLATE DISTRICT

STATEMENT OF THE CASE

At all times relevant herein, WILLIAM DAVID EVANS was an employee of SOUTHERN PACIFIC. On June 27, 1980, while employed by SOUTHERN PACIFIC, plaintiff EVANS, a black male, sustained personal injuries in the course of his employment. These injuries, which were caused by SOUTHERN PACIFIC's negligence, left EVANS physically handicapped. On April 5, 1983, EVANS filed a complaint in the Superior Court of the State of California for the County of Los Angeles against SOUTHERN PACIFIC for his injuries. (Los Angeles Superior Court Case No. C 448 486.)

During July and August of 1983, EVANS' injuries precluded him from being able to work. On August 11, 1983, the day he returned to work, SOUTHERN PACIFIC accused EVANS of violating Rule G, which

prohibits being under the influence of alcohol while on duty, and removed him from service pending an investigation.

Pursuant to the collective bargaining agreement between SOUTHERN PACIFIC and the International Brotherhood of Electrical Workers, of which EVANS was a member, a hearing was held by SOUTHERN PACIFIC regarding EVANS' alleged violation of Rule G. Following the hearing, SOUTHERN PACIFIC terminated EVANS from employment. EVANS appealed his discharge. Subsequently, without any hearing before a board created or provided pursuant to the Railway Labor Act, EVANS was reinstated, on a leniency basis, in July 1985.

On September 14, 1984, pursuant to the California Fair Employment and Housing Act (hereinafter "FEHA"), Government Code Section 12940 et seq.,

EVANS sued SOUTHERN PACIFIC for employment discrimination. (Los Angeles Superior Court Case No. C 514 091, attached hereto as Appendix A.) In his complaint, EVANS alleged that SOUTHERN PACIFIC discriminated against him by firing him because he is black and/or because he suffers from a physical handicap that resulted from the injuries he sustained as a result of SOUTHERN PACIFIC's negligence. EVANS further alleged that SOUTHERN PACIFIC's proffered reason for his termination, the alleged Rule G violation, was a mere pretext for discriminating against him on account of his race and/or physical handicap.

SOUTHERN PACIFIC moved for summary judgment or, in the alternative, summary adjudication, on the ground that EVANS' action for statutory employment discrimination was preempted by the

Railway Labor Act (hereinafter "RLA"), 45 U.S.C. § 151 et seq. The trial court granted SOUTHERN PACIFIC's motion for summary judgment on December 31, 1987. EVANS moved for reconsideration on January 8, 1988. Said motion was denied on January 29, 1988.

EVANS timely appealed the trial court's grant of summary judgment to the California State Court of Appeal. On September 15, 1989, the California State Court of Appeal reversed the trial court, ruling that "the RLA does not preempt plaintiff's action for employment discrimination on the ground of either race or physical handicap." Evans v. Southern Pacific Transportation Company, 213 Cal.App.3d 1378, 1388 (1989). The action was remanded to the trial court.

SOUTHERN PACIFIC filed a Petition for Review of the Court of Appeal's

decision with the California Supreme Court on October 24, 1989. Said petition was denied on November 30, 1989.

SUMMARY OF ARGUMENT

This instant Petition for Writ of Certiorari seeks to have this Court revisit a subject settled by this Court well over two decades ago.

Although SOUTHERN PACIFIC has mischaracterized EVANS' state court action as a common law wrongful termination claim and framed the questions presented for review on the basis of that mischaracterization, the fact remains that EVANS' action is actually a claim of discrimination in employment, based on race and/or physical handicap, brought pursuant to the California anti-discrimination statute.

Thus, the question actually raised

by the petition is whether the RLA preempts state anti-discrimination laws.

That question was answered by this Court in 1963 in Colorado Anti-Discrimination Commission v. Continental Airlines, Inc., 372 U.S. 714, 83 S.Ct. 1022, 10 L.Ed.2d 84 (1963). A related issue, whether pursuit of arbitral remedies under a collective bargaining agreement bars a claim of discrimination under anti-discrimination statutes, was settled by this Court eleven years later in Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974).

The California State Court of Appeal in the instant case expressly followed this Court's rulings in Colorado Anti-Discrimination Commission and Alexander v. Gardner-Denver. Moreover, the decision below is also consistent with

this Court's more recent preemption decisions in cases not involving anti-discrimination statutes, e.g. Atchison, Topeka and Santa Fe Railway Co. v. Buell, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987); Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988); Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981).

Accordingly, SOUTHERN PACIFIC has failed to demonstrate that there is an important question of federal law which has not been, but should be, settled by this Court or that the court below has decided a federal question in a way that conflicts with applicable decisions of this Court. Indeed, the exact opposite

is the case. The questions of law raised herein have been settled by this Court and the decision of the court below is consistent with this Court's decisions.

ARGUMENT

1. SOUTHERN PACIFIC's Petition Mischaracterizes Plaintiff's Complaint As One For Common Law "Wrongful Termination" When In Fact The Complaint Unequivocally States A Cause Of Action For Discrimination In Employment Based Upon Statute.

In its Petition for Writ of Certiorari, SOUTHERN PACIFIC asserts, without any basis in fact or law, that plaintiff EVANS' cause of action for race and/or physical handicap discrimination in violation of the FEHA is, in fact, a cause of action for tortious wrongful employment termination. (See Petition

for Writ of Certiorari, p.i, pp.13-14.) SOUTHERN PACIFIC's disingenuous attempt to mischaracterize the nature of EVANS' claim as a garden variety common law cause of action for wrongful discharge is exposed by simply reading the Complaint. The Complaint unequivocally states that SOUTHERN PACIFIC terminated EVANS because of his race and/or physical handicap in violation of the FEHA and that its proffered reason for terminating him is nothing more than a pretext for the unlawful discrimination.

The mischaracterization of plaintiff's cause of action as one sounding in common law, as opposed to one grounded in statute, has a direct bearing on the issue presented for review. When the issue is framed correctly (i.e. based upon the actual facts of this case) as one involving a question of preemption of

the RLA over a state anti-discrimination statute, it is clear that review by this Court is unwarranted. This Court specifically has ruled that a claim based upon a state anti-discrimination statute, such as in the instant case, is not preempted by the Railway Labor Act. Colorado Anti-Discrimination Commission v. Continental Airlines, Inc., 372 U.S. 714, 83 S.Ct. 1022, 10 L.Ed.2d 84 (1963).

2. The Petition for Writ of Certiorari Should Not Be Granted Because The Issues Presented Have Been Settled By This Court In Prior Decisions And No Important Question Which Has Not Been Settled Is Presented By the Petition.

In its Petition for Writ of Certiorari, SOUTHERN PACIFIC contends that review of the California Court of Appeal's decision by this Court is

appropriate because the state court's decision allegedly poses an important federal question regarding the preemption provisions of the RLA. SOUTHERN PACIFIC fails to recognize, however, that the issues presented herein have been addressed and decided by this Court and the California Court of Appeal's decision is consistent with those decisions.

In Colorado Anti-Discrimination Commission v. Continental Airlines, Inc., 372 U.S. 714, 83 S.Ct. 1022, 10 L.Ed.2d 84 (1963), the plaintiff alleged that he was denied employment with the defendant airline because of his race, in violation of Colorado's anti-discrimination statute. The Colorado Anti-Discrimination Act of 1957 provided that "it is an unfair employment practice for an employer to hire, to discharge, to promote or demote, or to discriminate in

matters of compensation against, any person otherwise qualified, because of race, creed, color, national origin or ancestry." The Colorado Supreme Court dismissed the complaint on the ground that the claim of racial discrimination was preempted by the RLA.

This Court reversed, holding that the RLA did not explicitly or implicitly preempt racial discrimination claims based upon state law:

> "There is even less reason to say that Congress, in passing the Railway Labor Act and making certain of its provisions applicable to air carriers, intended to bar States from protecting employees against racial discrimination. No provision in the Act even mentions

> discrimination in hiring. . . Nothing in the Railway Labor Act or in our cases suggests that the Act places upon an air carrier a duty to engage only in fair nondiscriminatory hiring practices. The Act has never been used for that purpose, and we cannot hold it bars Colorado's Anti-Discrimination Act." Id., 372 U.S. at 724; 83 S.Ct. at 1027 (footnotes omitted).

SOUTHERN PACIFIC attempts to distinguish Colorado Anti-Discrimination Commission by arguing that this Court's ruling was limited to discrimination against applicants for employment and does not apply to current employees, such as EVANS, who are discriminated against on the basis of race. This distinction

is nonsensical. These statutes on their face apply to current as well as prospective employees. Moreover, no such distinction was drawn by this Court. There is simply no language in the Court's decision, and indeed SOUTHERN PACIFIC does not cite to any, which limits the Court's holding to prospective employees only.

This Court reached a similar result in Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). There, the plaintiff alleged that he was discharged from employment on the basis of his race. Pursuant to the collective bargaining agreement between the employer and the union, of which the plaintiff was a member, the matter was submitted to arbitration and the termination was upheld. Concurrently, the plaintiff instituted a court action

for racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The trial court ruled that the collective bargaining agreement, which included a nondiscrimination clause, was the plaintiff's exclusive remedy for the employment discrimination. This Court disagreed:

> "[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.[1/]
>
> "The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and

institutions relating to employment discrimination. In sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.

"[1/] For example, Senator Joseph Clark, one of the sponsors of the bill, introduced an interpretive memorandum which stated: 'Nothing in title VII or anywhere else in this bill affects rights and obligations under the NLRA and the Railway Labor Act. . . [T]itle VII is

> not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes. If a given action should violate both title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction.' 110 Cong.Rec. 7207 (1964). . ." Alexander, 415 U.S. at 48-49, 94 S.Ct. at 1020-1021.

In sum, Colorado Anti-Discrimination Commission and Alexander v. Gardner-Denver Co. have settled the issues presented in this petition, and, as the court below held, are dispositive. The law is clear that state anti-discrimination statutes are not preempted

by the RLA.

Accordingly, the Petition for Writ of Certiorari should be denied.

3. The Petition For Writ Of Certiorari Should Be Denied Because The Decision Below Is Not In Conflict With The Decisions Of This Court.

As demonstrated above, the court below expressly followed the decisions of this Court in Colorado Anti-Discrimination Commission and Alexander v. Gardner-Denver. Therefore, review of the lower court's decision is not warranted.

Moreover, the decision of the court below is also consistent with this Court's more recent decisions relating to preemption of federal labor laws.

Since Colorado Anti-Discrimination Commission and Alexander v. Gardner-Denver, this Court has addressed the

issue of preemption of federal labor laws in a number of cases which did not involve anti-discrimination statutes, but rather involved the relationship between the federal labor laws and other federal or state statutes unrelated to anti-discrimination laws. In those contexts, this Court has held that if a claim is not "inextricably intertwined" with the provisions of the collective bargaining agreement, that is, if resolution of the claim does not require an interpretation or application of the terms of the collective bargaining agreement, the federal labor laws do not preempt. See, e.g. Atchison, Topeka and Santa Fe Railway Co. v. Buell, 480 U.S. 557, 107 S.Ct. 1410, 1415, 94 L.Ed.2d 563 (1987); Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 108 S.Ct. 1877, 1883-1885, 100 L.Ed.2d 410 (1988); Fort

Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 737, 101 S.Ct. 1437, 1443, 67 L.Ed.2d 641 (1981).

In Buell, supra, a railroad carman filed a complaint under the Federal Employers' Liability Act, 45 U.S.C. §51 et seq. This Court, in a unanimous decision, found that the plaintiff's cause of action stemmed from rights which existed independently from the terms of the collective bargaining agreement, and held that the RLA did not preempt the claim.

In Barrentine, supra, the lower court dismissed the plaintiffs' action, which alleged violations of the Fair Labor Standards Act, 29 U.S.C. Section 201 et seq., on the ground that the

plaintiffs' prior voluntary submission of the wage claims to a joint grievance committee pursuant to terms of the collective bargaining agreement barred the court action. This Court reversed, holding that the rights upon which the plaintiffs relied were non-waivable, independent statutory rights which existed separately from the terms of the collective bargaining agreement. Barrentine, 450 U.S. at 745, 101 S.Ct. at 1447.

In Fort Halifax Packing Co., supra, this Court rejected a claim that the Labor Management Relations Act ("LMRA"), 29 U.S.C. Section 151 et seq., and the Employee Retirement Income Security Act, 29 U.S.C. Section 1001 et seq., preempted a state statute which provided a one-time severance benefit to employees in the event of plant closing. In reaching this

conclusion, this Court emphasized that the state statute was not preempted "since its establishment of a minimum labor standard does not impermissibly intrude upon the collective-bargaining process." Fort Halifax, 482 U.S. at 23, 107 S.Ct. at 2215.

Similarly, in Lingle, supra, this Court held, in a unanimous decision, that the LMRA did not preempt a state cause of action for retaliatory discharge in violation of the state workers' compensation laws because resolution of the claim did not require an interpretation or application of the provisions of the collective bargaining agreement. Lingle, 486 U.S. at 407, 108 S.Ct. at 1882.

Even under the "inextricably intertwined" standard developed in the above cases, none of which involve anti-

discrimination laws, the decision of the court below is consistent with those rulings of this Court. EVANS' claim of race and/or physical handicap discrimination in violation of the FEHA does not turn upon an application or interpretation of the terms of the collective bargaining agreement. Instead, the right to be free from discrimination in employment is an independent right defined and enforced under state and federal law without any reference to the provisions of the collective bargaining agreement.[1/]

[1/] C.f. Caterpillar Inc. v. Williams, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987), where even claims based upon breach of individual employment contracts were not preempted because the contracts relied upon were not the collective bargaining agreement, but contrast Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972), where the common law wrongful termination claims arose out of and were directly related to

(continued...)

Resolution of whether SOUTHERN PACIFIC unlawfully discriminated against EVANS on the basis of his race and/or physical handicap does not require an interpretation or application of the collective bargaining agreement. Therefore EVANS' cause of action is not preempted.

1/(...continued)
the collective bargaining agreement. Neither Caterpillar nor Andrews is on point in the instant case because here we are dealing with a statutory cause of action for discrimination and not with a common law or contract claim. Nevertheless, even under the standards enunciated in Caterpillar, the claim herein would not be preempted because it is independent of the collective bargaining agreement. Caterpillar, 482 U.S. at 396, 107 S.Ct. at 2431-2432. Nor does Andrews, where the claim was inextricably intertwined with the collective bargaining agreement, compel a contrary result.

4. The Petition For Writ Of Certiorari Should Be Denied Because The Standards For Preemption Enunciated By This Court Have Been Consistently Applied By The Lower Courts, Including The Court Below In The Instant Case.

As demonstrated above, the issues raised by the instant Petition for Writ of Certiorari are well settled by numerous decisions of this Court. Nor is there any confusion among the lower courts regarding the standard to be applied. Like the California Court of Appeal in the instant case, a number of courts have held, consistent with this Court's decision in Colorado Anti-Discrimination Commission, that the RLA does not preempt actions under state or federal anti-discrimination laws. See,

e.g. Norman v. Missouri Pacific Railroad, 414 F.2d 73 (8th Cir. 1969) (the RLA did not preempt cause of action based upon Title VII of the Civil Rights Act of 1964); Coppinger v. Metro-North Commuter Railroad, 861 F.2d 33, 36-37 (2nd Cir. 1988) (claim that discharge violated 42 U.S.C. §1983 was not preempted by the RLA); McAlester v. United Airlines, Inc., 851 F.2d 1249, 1254-1255 (10th Cir. 1988) (claim of racially discriminatory discharge under 42 U.S.C. §1981 was not preempted by RLA); Muncy v. Norfolk & Western Railway Co., 650 F.Supp. 641, 643 (S.D. W.Va. 1986) (action for employment discrimination on basis of race and physical handicap under state anti-discrimination law was not preempted by RLA); Walker v. Consolidated Rail Corp., 178 Mich.App. 451, 444 N.W.2d 199 (1989) (race discrimination suit based on state

law was not preempted by RLA).

Nearly all of the cases cited by SOUTHERN PACIFIC as supporting its position that lower courts have found preemption are inapposite because they involved common law claims of wrongful discharge and not statutory anti-discrimination claims. Moreover, in those cases relied upon by Petitioner, the plaintiffs' asserted common law claims could not be resolved without construing the terms of the collective bargaining agreement.

The only cases cited by petitioner which involved preemption of an anti-discrimination statute are McCall v. Chesapeake & Ohio Railway Co., 844 F.2d 294 (6th Cir. 1988); Stephens v. Norfolk & Western Railway Co., 792 F.2d 576, modified in 811 F.2d 286 (6th Cir. 1986); and Samczyk v. Chesapeake & Ohio Railway

Co., 669 F.Supp. 156 (E.D. Mich. 1987). These cases, however, are clearly distinguishable.

First, unlike the instant case, none of the cases relied upon by SOUTHERN PACIFIC involved claims of race discrimination.

Second, unlike the instant case, the plaintiffs in each of the above cases had been disqualified from employment on the basis of a medical condition. The employer contended that the medical condition disqualified the employee from continued employment and the employee contended that it did not. Under these circumstances, the Sixth Circuit and the Michigan District Court found that the issues of whether the employees were in fact disqualified from continued employment by virtue of their medical condition were minor disputes cognizable

under the RLA and that the RLA provided the exclusive remedy.

In the instant case, neither the employer nor the employee contends that the employee's medical condition disqualifies him from continued employment. Here, the issue is whether the employer has discriminated against the employee based upon his race and/or physical handicap, and has used an alleged violation of a company rule as a pretext for such discrimination. None of the cases cited by SOUTHERN PACIFIC stands for the proposition that the RLA preempts the claims of discrimination involved herein.[2/]

[2/] Indeed, in Stephens, the Sixth Circuit expressly stated that the discharge at issue therein did not involve discrimination because of physical handicap and, therefore, its decisiion did not "in any way conflict with Colorado Anti-Discrimination Commission . . . " Stephens, 811 F.2d at 286, fn.9.

CONCLUSION

As the foregoing establishes, the issues which Petitioner seeks to have reviewed in the instant action are well settled by numerous decisions of this Court. The court below followed and correctly applied the rules set forth in these decisions. Moreover, the decision of the court below is consistent with the decisions of other state courts and federal courts which have applied the rules set forth by this Court regarding preemption. EVANS' claims of racial and/or physical handicap discrimination are based upon a state anti-discrimination statute and are wholly independent of the collective bargaining agreement. Accordingly, under well-settled authority, there is no preemption by the RLA. The Petition for Writ of Certorari raises no issues which warrant

review by this Court, and therefore should be denied.

Dated: May 16, 1990

Respectfully submitted,

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APPENDIX

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

WILLIAM DAVID EVANS, Plaintiff, vs. SOUTHERN PACIFIC TRANSPORTATION COMPANY, Does 1 1 through 20, inclusive, Defendants.	Case No. C 514091 COMPLAINT FOR EMPLOYMENT DISCRIMINATION

Plaintiff alleges:

1. The true names and capacities,

whether individual, corporate, associate or otherwise, of defendants DOES 1 through 20, inclusive, are unknown to plaintiff, who, therefore, sues those defendants by such fictitious names and asks leave to amend this Complaint to show their true names and capacities when the same have been ascertained. Plaintiff is informed and believes, and thereon alleges, that each of the defendants designated herein as a DOE is negligently or legally responsible in some manner for the events and happenings referred to herein, and negligently and unlawfully caused injuries and damages proximately thereby to plaintiff as herein alleged.

2. At all times mentioned herein, defendant SOUTHERN PACIFIC TRANSPORTATION COMPANY (hereinafter "SOUTHERN PACIFIC") was and now is a corporation duly organized and existing under and by virtue

of the laws of the state unknown to plaintiff and is authorized to do and is doing business in the State of California.

3. At all times herein mentioned plaintiff was employed by defendant SOUTHERN PACIFIC and the employment discrimination herein complained of arose while plaintiff was engaged in the course and scope of his employment by defendants, and each of them.

4. Plaintiff is informed and believes, and thereon alleges, that at all times herein mentioned the defendants, and each of them, were the agent, representative and employee of each of them and was at all times acting within the purpose, course and scope of said agency, representation and employment.

5. At all times mentioned herein, plaintiff was and continues to be a black

male with a physical handicap due to injuries received by plaintiff as a result of the negligence of defendants, and each of them, on or about June 27, 1980.

6. At times within one year prior to November 2, 1983, up through the present, defendants, and each of them, have continually carried out discriminatory conduct against plaintiff on the basis of his race and/or physical handicap due to injuries received by plaintiff as a result of the negligence of defendants, and each of them, on or about June 27, 1980.

7. On or about September 14, 1983, defendants, and each of them, discriminated against plaintiff based upon his race and/or physical handicap by firing him from his employment with defendants, and each of them.

8. Said defendants, and each of them, are continuing to discriminate against

plaintiff based upon his race and/or physical handicap due to injuries received by plaintiff as a result of the negligence of defendants, and each of them, on or about June 27, 1980, and plaintiff is informed and believes said discrimination will continue in the future.

9. On or about November 2, 1983, plaintiff filed a charge of discrimination against SOUTHERN PACIFIC with the Department of Fair Employment and Housing of the State of California, charging SOUTHERN PACIFIC with unlawful discrimination based upon his race and physical handicap under California Government Code. On or about November 22, 1983, plaintiff received written notice from said Department of Fair Employment and Housing advising a file on his charge of discrimination is closed and that he has a right to file a private lawsuit.

10. At all times mentioned herein, defendants, and each of them, pursued and continued to pursue a policy and practice of discrimination against plaintiff with respect to his employment.

11. As a direct and proximate result of the employment discrimination alleged hereinabove by defendants, and each of them, plaintiff has suffered and continues to suffer injuries to his health, strength and activity, which injuries have caused, and will continue to cause, plaintiff great mental, nervous and emotional pain and suffering, all to his general damage in an amount in excess of the minimum jurisdictional limits of the above-entitled court.

12. As a direct and proximate result of the employment discrimination alleged hereinabove by defendants, and each of them, plaintiff has suffered and continues

to suffer substantial loss of earnings, employees' benefits and other losses, and plaintiff has been harmed in his future earning capacity, all to plaintiff's damage in an amount not yet ascertained but as to which proof will be offered at the time of trial.

13. As a direct and proximate result of the employment discrimination alleged hereinabove by defendants, and each of them, plaintiff has been required to and did employ physicians and surgeons to treat and care for him and has incurred and will in the future continue to incur expense for such medical care and treatment. The total amount of such expense is not yet ascertained, but plaintiff will offer proof thereof at the time of trial.

14. As a direct and proximate result of the employment discrimination alleged

hereinabove by defendants, and each of them, plaintiff has been required to incur and did incur and will in the future incur attorneys fees.

15. In carrying out the employment discrimination alleged hereinabove, defendants, and each of them, acted with fraud, oppression and malice, and with advance knowledge of the improper and unlawful conduct of their agents, representatives and employees, and permitted said agents, representatives and employees, to represent defendants, and each of them, with a conscious disregard of the rights and safety to plaintiff, and defendants, and each of them, authorized to ratify the wrongful conduct of their agents, representatives and employees, thereby entitling plaintiff to an award of exemplary and punitive damages in a sum in excess of $1 millon dollars.

16. Plaintiff has no plans, adequate or complete remedy at law to address the wrongs alleged, as defendants, and each of them, have failed and refused to discontinue discrimination against plaintiff because of his race and/or physical handicap, and this action for preliminary injunction is the only means of securing full and adequate relief.

WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as follows:

1. General damages in excess of the minimum jurisdictional limits of the above-entitled Court;

2. All loss of earnings, earning capacity and other losses according to proof;

3. All medical and incidental expenses according to proof;

4. Punitive and exemplary damages in a sum in excess of the $1 million dollars;

5. For entry of a declaratory judgment that the policies and practices of defendants, and each of them, complained of herein violate plaintiff's rights protected under Government Code §12900, et seq.;

6. For entry of a preliminary and permanent injunction enjoining defendants, and each of them, from violating said sections; directing defendants, and each of them, to provide plaintiff equal opportunity in his employment to work free to discrimination; to restore and pay all the wages and all the other employment benefits due him during the time the employment discrimination existed; and to remove from the records of defendants, and each of them, all reference to conduct of plaintiff's based upon employment

discrimination;

7. For attorneys fees;

8. For costs of suit incurred herein; and,

9. For such other and further relief as the Court may deem just and proper.

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By: /S/
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